rating (*id.* at 77-79), and that finding was not further contested.

On the wage-basis issue, the evidence showed without dispute that Castro had been employed by two companies, MKB Construction and Petitioner General Construction, in the year before the injury, working forty hours in "most" of the weeks when so employed, and amassing 1,611 hours of work, for which he was paid $40,466 (Pet. App. 76-77).[4] The evidence did not show the actual number of individual days on which he worked, but showed a gap of about seven weeks between his layoff by MKB, at the end of a project, and his commencement of work for General (Claimant's Exh. 2, 3). Castro explained that layoffs at the ends of projects were a common feature of pile-butt work, but that the length of the seven-week gap in his employment in 1998 was attributable in substantial part to his choice to stay off work in order to pursue the permitting process for installation of a bulkhead at his home, and that that was the only time in the three years before the injury when he had voluntarily taken time off from work (Hrg. Transcript 49-50). The ALJ followed the methodology of § 10(a) of the Act, finding that Castro had "worked [as a pile driver] during substantially the whole of the year immediately preceding his injury," *id.*; equating his 1,611 hours of work to 201.35 regular eight-hour days, he divided the total earnings by that number and multiplied by 260 as specified in § 10(a), before dividing the result by 52 in accordance with § 10(d) to arrive at an average weekly wage of

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[4] The ALJ did not reconcile this figure – which included only $36,358 earned in calendar 1998 up to the time of the November 20 injury (Pet. App. 77) – with his recitation that Castro earned $39,717.62 in calendar 1998 (*id.* at 76).

$1,004.37 (Pet. App. 77, 86-87). The ALJ did not consider independently whether the 201.35 days' work he found constituted "substantially the whole of the year," but applied the "bright-line rule" of *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998), that anything over 75 percent of the idealized number of work days posited by § 10(a)-(b) qualifies for treatment under the regime of those subsections, instead of calling for the exercise of the ALJ's authority to fix a figure as the worker's "annual earning capacity" by reference to all the circumstances under § 10(c). The ALJ therefore did not even consider whether Castro's "earning capacity" would be most "reasonably represent[ed]" within the meaning of § 10(c) by Petitioners' contention, that he should simply divide Castro's total actual earnings in the year before the injury by 52, or by the figure he derived under § 10(a), or by something in between. Based on his weekly-wage finding, he determined that the appropriate compensation rate was $669.58 (two-thirds of $1,004.37) (Pet. App. 87).

The ALJ further determined that Castro's disability, from the time he reached "maximum medical improvement" from his injuries, should be classified as permanent *total* disability, compensable under § 8(a) of the Act, during the period of his vocational retraining under the plan approved by the Department of Labor (Pet. App. 79-84). He found that, as Petitioners contended (and, as he noted, Castro did not dispute), Castro was physically and otherwise qualified for some substantial employment that would be available to him absent the retraining program (*id.* at 79-81 & n.7). He acknowledged that under *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980) ("*PEPCO*"), to the extent Castro's disability after achieving medical recovery was only partial, he would qualify for

compensation only under the § 8(c) "schedule" (*id.* at 79). But he found that Castro had shown that he could not have kept up with his studies in the retraining program and engaged in paying employment at the same time; he pointed out that Petitioners' vocational consultant's opinion to the contrary was expressed without awareness of either the length and unpredictability of Castro's commute or his class schedule, and credited instead the OWCP counselor's view that working at a paying job while in school "would cause him 'a great deal of difficulty,'" a view buttressed by Castro's credited testimony that he was unable to continue his paid hotel internship (*id.* at 82-83). The ALJ also examined the appropriateness of the hotel-management course of study adopted by the OWCP, and found it "reasonable" to maximize Castro's earning potential with his reduced physical capacity (although even so it would not bring him up to his pre-injury level of earnings) (*id.* at 83-84). Accordingly, the ALJ held that under *Abbott v. Louisiana Insurance Guarantee Ass'n*, 40 F.3d 122 (5th Cir. 1994) (Byron White, J.), *aff'g* 27 Ben. Rev. Bd. Serv. (MB) 192 (1993), and *Brown v. National Steel & Shipbuilding*, 34 Ben Rev. Bd. Serv. (MB) 195 (2001), Castro should be compensated for permanent *total* disability for the duration of the retraining program (*id.* at 84).

4. On Petitioners' appeal from the ALJ's award under § 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3), the Benefits Review Board affirmed (Pet. App. 32-60). The Board held that in following the wage-basis calculus of § 10(a), (d)(1), the ALJ had properly followed the rule of *Matulic*, supported by the Director of the OWCP (the delegate of the authority of the Secretary of

Labor for administration of the Longshore Act[9]): that, so long as an injured employee has worked at least 75 percent of the number of days specified in § 10(a) and (b) in the year preceding the injury, he or she has been employed for "substantially the whole of the year," and the disparity between the result of the arithmetic calculation called for by those subsections and his or her actual earnings in that year does not, standing alone, establish that the former does not "reasonably represent [his or her] annual earning *capacity*" within the meaning of § 10(c) so as to call for the more detailed inquiry called for by that subsection (Pet. App. 55-60).

The Board further rejected Petitioners' procedural challenge to the OWCP's adoption of the retraining program for Castro without affording them a hearing before an ALJ (notwithstanding the ALJ's explicit consideration of and agreement with the reasonableness of the plan) (Pet. App. 50-55). The Board explained that the determination of appropriate retraining is committed by the Act to the Secretary of Labor (and delegated by the Secretary to the local district directors) under § 39(c)(2) of the Act and the regulations implementing that provision, rather than committed to the APA-formal-hearing process before ALJs as are determinations of the compensation payable, under § 19(c)-(e), 33 U.S.C. § 919(c)-(e) (Pet. App. 50-54).

Petitioners also contended before the Board that the legal principle underlying the ALJ's total-disability award during retraining was erroneous. The Board rejected that argument (Pet. App. 36-45). It explained that the rule that while an injured worker is pursuing an OWCP-approved

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[9] *See, e.g.*, 20 C.F.R. §§ 701.201-.203.

plan of full-time vocational rehabilitation that forecloses engagement in otherwise available employment, he or she should be treated as totally disabled, is not a "novel legal concept." Rather, it is merely an application of the commonplace proposition that an injured worker's disability is measured, not merely by the *existence* of work within his or her residual capacity and qualifications, but on the reasonable, practical *availability* of such work *to him or her*, to the special situation of a full-time retraining program, and rests on recognition that alternative work that is otherwise suitable is *not* realistically "available" to the worker during such a program (Pet. App. 42-43). The rule had been consistently applied where appropriate in a substantial line of decisions of the Board, was fully supported by the construction of the Act by the Director, OWCP, and had been fully approved by the two courts of appeals called upon to consider its propriety (*Abbott*, *supra* at 8, and *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Brickhouse)*, 315 F.3d 286, 293-96 (4th Cir. 2002)) (Pet. App. 44-45).

Finally, the Board found that the ALJ's determination that alternative paying employment was not reasonably available to Castro during his retraining courses was supported by the substantial evidence on which the ALJ reasonably relied, and accordingly that the award of compensation for total disability during the retraining period was in accordance with law (Pet. App. 46-50).

5. On Petitioners' petition for review of the Board's decision by the Ninth Circuit under § 21(c) of the Act, 33 U.S.C. § 921(c), the court affirmed (Pet. App. 1-31). Like the Board, despite the obvious controlling force of its 1998 decision in *Matulic*, and its recent iteration of the rule of that decision in *Stevedoring Services of Am. v. Price*, 382

F.3d 878, 884-85 (9th Cir. 2004) (claimant's work on 197 days, or barely 75 (75.77) percent of § 10(a) multiplier of 260, warranted use of § 10(a) under *Matulic*), *cert. denied*, 125 S. Ct. 1724 (2005), the court again explained the basis of the rule and its applicability to Castro's case (Pet. App. 20-27).

The court of appeals also affirmed the Board's rejection of Petitioners' assertion that the adoption of the vocational-rehabilitation plan by the OWCP, without an opportunity for an ALJ hearing and decision on its appropriateness, violated its procedural rights; that determination was reserved to the discretion of the Secretary and her delegate in the local OWCP office (Pet. App. 27-31). Petitioners do not pursue that assertion before this Court.

Finally, the court of appeals joined the other circuits that have considered the question in approving the administrative construction of "disability" under the Act with respect to the status of a permanently disabled worker whose engagement in an OWCP-approved, full-time retraining program realistically forecloses otherwise available work (Pet. App. 12-15), and rejected Petitioners' six asserted bases for distinguishing the decisions of the other courts of appeals (*id.* at 15-20). It rejected most of those contentions on the ground that they were based on characterizations of the evidence contrary to the ALJ's findings of fact supported by substantial evidence (*id.* at 16-19). But it found Petitioners' final contention, that the application of the *Abbott* principle to a claimant whose permanent disability is limited to a "scheduled" member is foreclosed by this Court's decision in *PEPCO*, *supra* at 8, erroneous as a matter of law; *PEPCO*'s holding that partially-disabled claimants under the Act whose injuries are limited to scheduled members are limited to recovery

under the schedule, and cannot recover for their permanent partial losses of earning capacity as determined under § 8(c)(21), (h), expressly excepted cases in which the disability resulting from such an injury is not partial but total, and Castro's disability during retraining was in the latter category (Pet. App. 19-20).

REASONS FOR DENIAL OF THE WRIT

I. The Decisions Below Are in Accordance with Law in Applying § 10(a) Rather Than § 10(c) to Determine Castro's Compensation; There Is No Real Conflict Among the Circuits, and This Would Not Be an Appropriate Case for Consideration of the Issue in Any Event.

A. Validity of the Ninth Circuit Rule

The court of appeals adheres to a rule that the application of § 10(a) is required where the only ground asserted for its inapplicability is that the claimant worked less than the idealized number of workdays on which its calculation is based, so long as he or she has worked at least 75 percent of that number of days in the year preceding the injury. Petitioner argues (Pet. 9-13) that such a rule conflicts with the "clear statutory language" providing that § 10(c), rather than § 10(a), should be used when the latter cannot "reasonably and fairly be applied," and that it conflicts with authorities in other circuits. That contention does not warrant review.

First, Petitioners' statement of the court of appeals' rule somewhat misrepresents it. *Matulic*, *Price*, and the decision below hold only that so long as the claimant has worked at least 75 percent of the idealized number of

workdays specified in § 10(a), the fact that the use of that number as the multiplier of the worker's "average daily wage" somewhat overrepresents the worker's actual annual earnings, *standing alone*, does not warrant the conclusion that § 10(a) "cannot reasonably and fairly be applied," and the consequent substitution of the detailed, individualized inquiry called for by § 10(c) for use of the § 10(a) calculus. The only "bright-line rule" involved is that § 10(c) "may not be invoked in cases in which the *only* significant evidence that the application of [§ 10(a)] would be unfair or unreasonable is that claimant worked [less than the number of days specified in § 10(a), so long as he or she worked] more than 75% of th[os]e days[,] in the year preceding the injury." *Matulic*, 154 F.3d at 1058-59 (emphasis added), *quoted*, Pet. App. 22 n.11.

Such a rule plainly serves the very purpose of § 10(a). Just as the court of appeals has observed, a degree of overrepresentation, or "idealiz[ation]," of a worker's earnings history is built into the calculus called for by § 10(a); virtually no one actually works 52 full weeks in a year. This is a workers'-compensation program; employers are responsible to institute payments promptly upon knowing of an employment-related disability or death, without awaiting the filing of a claim, the engagement of counsel, or the development and submission of evidence by the worker (*see* Longshore Act § 14(a)-(b), (e), 33 U.S.C. § 914(a), (b), (e)), and it is critical to the prompt-delivery-of-benefits objective that is at the heart of the workers'-compensation compromise of interests that they do so in the great majority of cases. The mechanical and simple calculation called for under § 10(a) permits this objective to be readily accomplished in most cases; the employer's or its insurer's claims staff need only scan the injured

worker's pay records and divide the number of days worked by the total earnings to arrive at an average daily wage, and multiply it by five (conflating the statutory steps of multiplying by 260 (assuming the usual workweek is five days) and dividing by 52 under § 10(d)(1)) to arrive accurately at the wage basis for prompt, dispute-free payments. Petitioners' staff apparently accomplished the application of such methodology in the present case, initially basing its payments on a wage basis of $988.62, less than $16 short of that determined by the ALJ under § 10(a) (producing payments only about $10 a week less than was awarded after needless litigation of the wage-basis issue).

Section 10(c), on the other hand, is anything but simple and predictable in outcome. Its call for determination of "such sum as . . . shall reasonably represent the annual earning *capacity* of the injured employee" at the time of the injury, with a non-exclusive list of factors for consideration, does not, as Petitioners appeared to assume below, allow a simple division of the worker's total actual earnings in the year before the injury by 52. Rather, it calls for inquiry into and consideration of such factors as recent changes in the claimant's hourly wage rate, overtime patterns, and the *reasons for* and likelihood of recurrence in the future (absent the injury) of the work the claimant has *missed* in the preceding year – *e.g.*, atypical labor strikes, personal illnesses, previous employment injuries, family crises, etc., all of which call for adjustment of actual earnings to arrive at the worker's earning *capacity*.[10] Obviously

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[10] *See generally* digest of cases at Benefits Review Board, LONGSHORE DESKBOOK 10-6a to -10g (2005) (available at http://www.dol.gov/brb/References/Reference_works/lhca/lsdesk/dbsec10.htm).

such a determination cannot be made without relatively extensive inquiry, and its outcome cannot be predicted even within reasonable limits without either extensive negotiation or litigation. The invocation of § 10(c) thus introduces uncertainty and delay, and encourages litigation, on one of the few questions that is common to every case in which a worker misses time from work as a result of an employment injury.

Thus, as a matter of balancing certainty and efficiency (not only in the administration of the Act but in employers' and their insurers' initiation of payments under it) against perfection in representation of the worker's lost earnings, it is strongly preferable to confine the § 10(c) inquiry to those cases that truly require it to avoid *serious* distortion of the earning capacity two-thirds of which is to be replaced by periodic compensation payments. A calculation under § 10(a) results in a "theoretical approximation of what a claimant could ideally have been expected to earn" if the claimant had worked "every available work day in the year." *Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000) (citation omitted). Congress surely understood that few employees work every available workday in a year, yet when it added the five-day-worker provision to § 10(a)-(b) in 1948,[11] it provided the idealized multiplier of 260, making it applicable so long as the claimant has worked "*substantially* the whole of the year." It is entirely reasonable for the Ninth Circuit – and the Director, OWCP, as the Act's administrator – to take this to reflect Congress's judgment that the convenience and certainty of the § 10(a) calculus justifies some degree of

[11] Pub. L. No. 80-757, § 4, 62 Stat. 602, 603 (June 24, 1948), *amending* Longshore Act § 10(a)-(c), *as amended*, 33 U.S.C. § 910(a)-(c).

overcompensation. *Cf. PEPCO*, 449 U.S. at 282 (unfairness in many cases of schedule's over- or under-representation of injuries' effect on workers' future earnings justified by "interest in having [employers'] contingent liabilities identified as precisely and as early as possible").

Of course, where the claimant has *not* worked "substantially the whole of the year" because the employment is *available* only intermittently or seasonally, the application of § 10(a) or (b) would produce a wage basis with no relation not just to the worker's actual past earnings but even to his or her *ideal* earnings. The court below, however, has repeatedly recognized that the *Matulic* rule has no application to cases involving such work (*see infra* at 17), and Petitioners have never contended that Castro's work as a piledriver carpenter was of that character.

B. No Conflict

Contrary to Petitioners' assertion that the Ninth Circuit's rule conflicts with the law in the Seventh, Fifth, and Fourth Circuits (Pet. 10-12), there is no such conflict.

Although the *Matulic* majority did not respond to the assertion of the dissenting district-judge member of the panel that the majority "consciously created an inter-Circuit conflict" with *Strand v. Hansen Seaway Service*, 614 F.2d 572, 574 (7th Cir. 1980), *Matulic*, 154 F.3d at 1061 (dissenting op.); *see id.* at 1058 n.4 (majority op.) (characterizing *Strand* as "upholding application of § 910(c) when claimant worked 84% of total workdays in the measuring year"), in fact there is no conflict. *Strand* actually involved a worker at a cold-water port that only "operate[d] for thirty-six weeks of the year," 614 F.2d at

573, and was icebound for the rest of the year. As the court recited,

> The record discloses that during the year prior to his injury, petitioner worked *thirty-six weeks (or 252 days)* for which he was paid $11,431.86. Pursuant to section 10(a), the [ALJ] first calculated his average annual earnings to be $13,608.00: 300 times [the] average daily wage of $45.36 ($11,431.86 divided by 252 days).

Id. at 574 (emphasis added; footnote omitted). The *Strand* court simply affirmed the Board's reversal of the ALJ's use of § 10(a) on the ground that the legislative history of the revision of § 10(a)-(c) in 1948 explicitly showed that § 10(c), rather than § 10(a) or (b), was intended to be applied to "seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek," S. REP. NO. 1315, 80TH CONG., 2D SESS., *reprinted in* 1948 U.S. Code Cong. & Admin. News 1979, 1982. 614 F.2d at 575. *See also* H.R. REP. NO. 2095, 80TH CONG., 2D SESS. 8, 14-15 (1948) (§ 10(c) applies "where the employment itself, in which the injured employee was engaged when injured, does not afford a full year of work," or "affords less than a full workyear or workweek"). Accordingly, the *Strand* court did not address the plain errors of the ALJ's calculation even under § 10(a) itself: the claimant did *not* "work" 252 days, i.e., every single day in the thirty-six weeks the port was open; assuming, since the ALJ used the multiplier for a six-day-a-week worker under § 10(a), that he worked six days a week (otherwise use of § 10(a) was contrary to its own terms), even if he did not miss a single day of available work during the season, he "worked" *216* days, not 252; that is *72* percent of the applicable § 10(a) multiplier, not (as both opinions in

Matulic uncritically calculated) 84 percent. For that reason *as well as* because *Matulic* explicitly recognized that § 10(a) is inapplicable to employment that is "seasonal or intermittent," 154 F.3d at 1058; *see also Price*, 384 F.3d at 884, there is no indication whatever that the Ninth Circuit would apply its rule to require application of § 10(a) in a case like *Strand* (much less that it would approve the ALJ's *manner* of application of § 10(a) there). Rather, it would unmistakably agree that § 10(c) must be applied on such facts.

Far from having "expressly declined to follow *Matulic*," Pet. 11, the Fifth Circuit's decision in *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601 (2004), explicitly agreed with *Matulic* that "[o]ver-compensation alone does not usually justify applying § [ ]10(c) when § [ ]10(a) or (b) may be applied," because overcompensation "is built into the system institutionally." *Id.* at 606 n.1 (citation omitted). Although it noted that it had not "adopted a bright-line test" like the Ninth Circuit's 75-percent maximum for resort to § 10(c) on the basis of the shortfall alone, it affirmed the Board's reversal of the ALJ's resort to § 10(c), and simple division of the claimant's part-year earnings by 52, on the ground that he "did not agree with Claimant that [§] 10(a) was designed to 'show what Claimant could earn under ideal circumstances,'" and therefore that application of § 10(a) would not be "fair"; it emphasized that the ALJ's view was contrary to Fifth Circuit law. *Id.* at 606.

And finally, Petitioners' assertion that the *Matulic* rule applied below conflicts with *Baltimore & O. R.R. v. Clark*, 59 F.2d 595, 599 (4th Cir. 1932), is likewise baseless. There "[t]he record show[ed] that the [claimant's] employment . . . was intermittent and discontinuous," *id.*,

and the 300-day multiplier that was exclusively provided by § 10(a)-(b) as then in effect (before enactment of the current version in 1948) would have produced more than double the worker's actual annual earnings. As in *Strand*, both because the work did not *offer* full-time employment *and* because the number of days the claimant had worked in the preceding year fell below the Ninth Circuit's 75-percent threshold for presumptive appropriateness of idealizing the earnings by application of § 10(a), the court below plainly would not approve application of § 10(a) on such facts any more than the Fourth Circuit did in *Clark*.

C. Inappropriate Case for Consideration of the Question

Even if there were an intercircuit conflict requiring resolution by this Court, the present case would be an inappropriate one for the Court's consideration of it. Under clear, recent (post-*Matulic*) Ninth Circuit authority, where "the exhibits failed to apportion the hours [the claimant] worked per week into days, an essential element under the § []10(a) calculation," the ALJ must apply § 10(c). *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618 (9th Cir. 1999). This was such a case; the ALJ arrived at the figure he used as the "days worked" simply by dividing the total *hours* worked by eight (*see* p. 7 *supra*). Yet Petitioners neither preserved below nor have raised at any stage an objection to the ALJ's substitution, under precisely the circumstances described in *Duhagon*, of the number of full eight-hour days that Castro's *total* hours worked were *equivalent* to for the actual number of days he worked. It would be peculiarly inappropriate for this Court to review a Ninth Circuit rule that is said to be inconsistent with the law in other circuits in a case on

whose record the Ninth Circuit would agree the rule was inapplicable.

In sum, the Ninth Circuit's rule, in accordance with the administrative construction of § 10(a)-(c), reasonably implements the statutory scheme and does not conflict with the law in any other circuit; and in any event, the record of this case would not even present the question on which Petitioners seek review but for their failure to point out below the inapplicability of the Ninth Circuit's rule under its own law.

II. The Award of Compensation for Total Disability During Castro's OWCP-Approved Full-Time Retraining Program Does Not Conflict with This Court's Decision in *PEPCO* or with Any Decision of Another Court of Appeals.

A. Total Disability During Retraining in General

Three circuits have considered the administrative construction of "disability" and "total disability" as defined and used in the Longshore Act, as it applies to workers engaged in full-time vocational retraining that the OWCP has approved under § 39(c)(2) of the Act as appropriate in view of the limitations imposed by a compensable injury. All three have approved that construction: even if the worker is *otherwise* capable of securing and performing some regular employment, and hence would be only partially disabled, while he or she is engaged in retraining that practically forecloses engagement in such work, the disability is total. Pet. App. 13-15; *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Brickhouse)*, 315 F.3d 286, 293-96 (4th Cir. 2002); *Abbott v. Louisiana*

Insurance Guarantee Ass'n, 40 F.3d 122, 126-28 (5th Cir. 1994) (Byron White, J.).

Petitioners say no more about *Abbott* and *Brickhouse* than that they are "at least questionable." Pet. 16. Even if such a characterisation were adequate to warrant this Court's review, it is baseless. Petitioners' description of those decisions as allowing "a worker with the factual capacity to earn wages" to be paid compensation for total disability, *id.*, like their assertion that it is "undeniabl[e]" that Castro is only partially disabled because he "retains the ability to earn wages," *id.* at 14, simply ignores the basis of the administrative and judicial construction that is the basis of all three decisions. Section 2(10) of the Act, 33 U.S.C. § 902(10), defines "disability" as used in the Act generally to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment"; and § 8(a), while not *defining* "permanent total disability" except as implicit in the § 2(10) definition as qualified by the word "total," provides that (except in certain specified cases in which it is presumed) it "shall be determined in accordance with the facts." There is no difference in principle between an injured worker's foreclosure from acceptance of work that is within his present capacity and qualifications, and for which he would readily be hired, because he is engaged in a time-consuming course of *physical* rehabilitation that is likely to ameliorate the future effects of the injury but that precludes such work so long as it continues, and such foreclosure resulting from a *vocational* retraining program that is likewise a consequence of the injury. *Abbott*, *Brickhouse*, and the decision below merely apply standard principles for the determination of the *availability to the disabled worker* of suitable work (*see*,

e.g., authorities cited *supra* at 2 n.3), to the special situation of a full-time retraining program determined by the OWCP to be appropriate to restore as much as reasonably possible of the worker's pre-injury earning capacity. It merely recognizes reality to say that, during such a program, the worker does *not*, as Petitioners say, "retain the ability to earn wages," since he or she could do so only by foregoing the retraining. And the strong policy favoring such restoration of earning potential strongly supports such recognition.

In any event, Petitioners have not even attempted to show, or even alleged (beyond the bare assertion at the outset of their Statement of the Case that the question is an "important" one, Pet. 2) that the OWCP approves full-time retraining programs for otherwise partially-disabled workers with anything like the frequency that would make the question of sufficient importance conceivably to warrant this Court's review. The administrative construction of "incapacity to earn" in these unusual circumstances is reasonable, supported by the policy favoring the greatest practical recovery of permanently injured workers' earning capacity, and the subject of uniform approval by the courts of appeals that have considered it.

B. Effect of the "Schedule" and *PEPCO*

Finally, Petitioners' principal contention appears to be that because Castro's injury, unlike those in *Abbott* and *Brickhouse*, was confined to a scheduled member, the decision below conflicts with this Court's decision in *PEPCO* and warrants review "even if [those cases] were correctly decided." Pet. 16-17. This argument ignores the

directly applicable, explicit qualification of the holding in *PEPCO*.

That 1980 decision concerned a worker with an injury confined to a scheduled member (as here, a partial loss of use of a leg), whose impact on his pre-injury earning capacity was far greater than would be compensated by the award provided by the schedule.[12] Despite the applicability of the schedule, the ALJ had allowed him to "elect to receive a larger recovery under § 8(c)(21) [applicable in terms to 'other cases' of permanent partial disability] measured by the actual impairment of wage-earning capacity caused by his injury," and the Board and a divided D.C. Circuit panel had affirmed. 449 U.S. at 271. This Court reversed, holding that where the schedule applies, it is mandatory and exclusive of resort to the "other cases" provision of § 8(c)(21).

The Court recognized, however, that even an injury confined to a scheduled member could produce permanent *total* disability, during which the schedule is entirely inapplicable. "[S]ince the § 8(c) schedule applies only in cases of permanent partial disability, *once it is determined that an employee is totally disabled the schedule becomes*

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[12] The worker's pre-injury earnings were said to be $332 a week; after recovery from the injury, he could earn only $202 a week – a difference of nearly $7,000 a year, for the rest of his working life, for which the ALJ awarded about $4,500 a year under § 8(c)(21). His entitlement under the schedule, depending on the unresolved question of the appropriate rating of the extent of the loss of use of the leg (opined to be from 5 to 20 percent), would be a total of less than $13,000, and perhaps as little as a quarter of that. *See* 449 U.S. at 283 n.25 (Opinion for the Court), 287-88 & nn.2-3 (Blackmun, J, dissenting); *but see id.* at 271 & n.2 (pre-injury earnings of $22,000; wage-basis figure of $332 unexplained, but actual loss about $10,000 a year).

irrelevant," and "[w]e are concerned here solely with a case in which a scheduled injury, limited in effect to the injured part of the body, results in a permanent *partial* disability." 449 U.S. at 279 n.17, 280 n.20 (emphases added). Thus Petitioners' claim that even if an otherwise partially disabling *unscheduled* injury can be considered totally disabling during a full-time vocational rehabilitation program as held in *Abbott* and *Brickhouse*, *PEPCO* forecloses the "extension" of that rule to a scheduled injury by the court below in the present case, is inconsistent with *PEPCO* itself.

Finally, Respondent Castro is aware that Petitioners have a number of industry Amici Curiae lined up to support the petition. However impressive a display of the industry's litigation budget this provides, contrary to the appearance such support might foster, even if one were to confine the focus to Longshore Act issues, neither the *Abbott* question generally nor the applicability of its principle to otherwise scheduled-disability cases would make any realistic list of the five or ten unsettled issues most warranting this Court's attention, in terms either of the number of cases or the amounts of liability affected, or of a divergence of approach among circuits. *E.g.*, *Gros v. Fred Settoon, Inc.*, 865 So.2d 143 (La. App. 2003), *cert. denied*, 871 So.2d 352 (La.), *cert. denied*, 125 S. Ct. 408 (2004) (No. 03-1699) (direct intercircuit, and intracircuit state-versus-federal, conflicts on effect of Longshore Act award, without litigation of question whether injured worker was "crew member" excluded from Act's coverage, on subsequent pursuit of Jones Act and general-maritime-law remedies for injury, left unresolved after grant of review in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997)); *Jonathan Corp. v. Brickhouse*, 142 F.3d 217 (4th

Cir.), *cert. denied*, 525 U.S. 1040 (1998) (approach to shoreside scope of Longshore Act situs-of-injury requirement broadly conflicting with standards prevailing in other circuits). The present issue, on which there is not even claimed to be an intercircuit conflict, concerns a relatively modest amount of entitlement and liability in a relatively minuscule number of cases (those in which the OWCP approves, and the worker pursues, a full-time retraining program for a worker whose permanent disability would otherwise be confined to the schedule). The issue has no legitimate claim upon this Court's docket.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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No. 05-371

In The

Supreme Court of the United States

GENERAL CONSTRUCTION COMPANY, et al.,

Petitioners,

v.

ROBERT CASTRO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR AMERICAN INTERNATIONAL GROUP, INC. AND CNA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE[1]

Amici American International Group, Inc. ("AIG") and CNA are U.S. based private and publicly traded corporations which together, through their member companies, underwrite the majority of the federal workers compensation coverage mandated by the Defense Base Act ("DBA"), 42 U.S.C. § 1651, *et seq.*, that protects American and foreign workers employed by companies contracted by the United States government for work overseas. While wholly independent and distinct entities in aggressive competition, as leaders of the DBA underwriting industry their interests and those of the private employers and contractors that they cover merge as concerns the outcome and consequences of this case.

The DBA extends the provisions of the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.*, to all civilian employees working overseas for a private employer under a contract with the United States government or any of its executive departments, branches or agencies where the purpose of the contract is "to perform public work overseas, public work constituting government-related construction projects, work connected with the national defense, or employment under a service contract supporting either activity." *University of Rochester v. Hartman*, 618 F.2d 170, 176 (2d Cir. 1980). All employees working under such a contract, including Americans, foreign nationals and third country nationals are within

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[1] All parties have consented to the filing of this amicus curiae brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amici and its counsel made a monetary contribution to the preparation or submission of the brief.

DBA cover. Similarly, all employees of subcontractors and subordinate contractors of the DBA contract are covered.[3]

An employer, contractor, subcontractor and subordinate subcontractor whose employees are working under a contract within DBA cover must secure the payment of DBA compensation benefits. The failure to do so presents significant financial exposure to the entity as well as to the corporate officers, including the obligation to make the DBA benefit payments, civil fines, criminal misdemeanor charges and, critically, the loss of the protection of the statute's exclusive remedy provision enabling the employee to sue for negligence. 33 U.S.C. §§ 904, 932, 938. Further, if a subcontractor or subordinate subcontractor fails to secure DBA compensation benefits, the contractor assumes liability for that financial obligation. 33 U.S.C. § 904.

The number of employees, employers and contractors within DBA cover has increased dramatically as the U.S. government and its instrumentalities have accelerated and expanded the utilization of private interests to further its foreign policy objectives. Apart from military, security and intelligence concerns, there has been a rise in the use of private contractors to implement American objectives through overseas reconstruction, technology transfer,

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[3] By virtue of 42 U.S.C. § 1651(a), the LHWCA applies in all respects to DBA employees, except where modified, and provides the substantive law as to the type and level of compensation disability benefits statutorily mandated. The modifications with respect to benefits for all DBA employees concern the inapplicability of the LHWCA minimum benefits rate, 33 U.S.C. § 906(b), and with respect to alien and non-U.S. residents a differing designation of statutory dependents for purposes of the payment of death benefits. 42 U.S.C. § 1652(a)(b).

sophisticated equipment management, security trading, markets development and the spread of democratic education and values. These government contracts, as a matter of law, mandate DBA cover. Yet, clearly the overwhelming factor in the exponential growth of employees within DBA cover is the privatization of a significant number of consequential functions previously performed by the American military. Adopted as a manpower policy in the Persian Gulf War in 1991 and growing in implementation through the Balkans War and now the Wars in Iraq and Afghanistan, civilian staffing in military theaters, in security and intelligence operations and in nation building seems certain to continue. As a consequence, judicial pronouncements on the DBA are of critical concern to the private contractors who enable performance of these important American policy-implementing contracts, as well as to the DBA underwriting industry which provides the mandated cover.

Amici AIG and CNA have a vital interest in the uniform, informed and Congressionally directed determination of DBA issues. The Ninth Circuit decision in *General Construction v. Castro*, 401 F.3d 963 (9th Cir. 2005),[3] in its misinterpretation of the benefits provisions of the LHWCA and, therefore, its misinterpretation of the benefits provisions of the DBA, has failed to provide either a uniform, informed or statutorily directed determination. By judicially creating a new disability classification and compensation entitlement of temporary total benefits to a claimant who voluntarily removes himself from wage earning employment by participating in a vocational

[3] Reprinted in Petition for Writ of Certiorari Appendix ("Pet. App.") pgs. 1-31.

training program, and who otherwise would be limited to a permanent partial disability schedule, the Ninth Circuit has introduced a scenario inviting claim abuse and extraordinary claim expense. The consequences of the decision, including uncertainty in application across the country and potential runaway escalation in claim costs, will have an unsettling impact on premium structure and, the interest of underwriters to provide DBA cover. A reduction of DBA underwriters and a restriction of commitment to provide mandated DBA cover would be of significance to the ability of the U.S. government to effect its foreign interest through DBA overseas contracts.

STATEMENT OF THE CASE

For purposes of this brief, amici AIG and CNA adopt the detailed review and analysis set forth in the STATEMENT OF THE CASE sections contained in the Petition For Writ Of Certiorari and the amicus curiae brief of the Longshore Claims Association.

Amici do advise that the negative impact of the *Castro* decision will be of significance to the DBA underwriting industry and, consequently, the ability of DBA contractors to cause and accomplish the U.S. government interests that is their contractual obligation. Even more so than in LHWCA matters, the decision presents to interested DBA claimants an almost unfettered opportunity to unilaterally manipulate their disability classification so as to bring it within the *Castro* rule and thereby obtain temporary total benefits at the maximum compensation rate, presently at $1,047 a week, tax free. The situation is presented on a very wide scale as a consequence of certain inequitable

results obtained by the application of the provisions of the LHWCA, a domestic compensation law envisioning a local labor market with fairly stable wage earnings, to the facts and circumstances of a typical DBA employee working under contract in Iraq, Afghanistan and a host of other countries around the world in which U.S. interests are pursued through private contractors.

It is the experience of amici AIG and CNA that the average weekly wage of an American DBA employee working in any number of war zones and hostile areas subject to terrorist or insurgent attacks throughout the world is sufficiently high so as to entitle the employee to the maximum compensation rate allowed by the statute, i.e., a weekly compensation benefit of $1,047. Moreover, it is the common experience that the wages presently paid for DBA employment generally are 300% to 400% higher than those paid to the same individuals utilizing their skills and trades at home in the U.S. For an example, a police officer in Houston or St. Louis might earn $45,000 domestically, but as a DBA employee performing similar functions overseas, his wages would likely be in the range of $120,000. Similarly, a tradesman, such as a plumber, electrician or other construction skilled craftsman, will earn almost four times more overseas than he would earn in the U.S. The DBA spike in earnings, a situation that does not generally occur and was not contemplated in the LHWCA, has a profound impact on DBA claimants' disability compensation benefits entitlement arising in connection with permanent partial disability scheduled injuries and in connection with loss of wage earning capacity injuries.

Application of section 10 of the LHWCA to determine the average weekly wage or pre-injury earning capacity of a DBA claimant yields a favorable result for claimant's

benefit because the LHWCA formula does not factor out the spike in earnings overseas and accepts the overseas wages as reflective of pre-injury earning capacity and average weekly wage. A DBA claimant who suffers an injury which prevents him from returning overseas to his "regular" employment returns to the U.S., even if to his ordinary domestic wages, with a built-in significant loss of earning capacity. So too does a scheduled injury claimant who receives the benefit of the maximum compensation rate in the calculation of his permanent partial disability award.

Such claimants will assess the Ninth Circuit *Castro* rule as a windfall and an opportunity to convert their disability classification from permanent to temporary disability by volunteering to enter a Labor Department approved retraining program. These DBA claimants will receive temporary benefits at the maximum rate for the entire time period that they are in the program, which certainly will extend for years, thereby collecting tax-free compensation benefits in excess of $52,000 a year. The ability of a claimant to manipulate his disability classification on his own accord, subject only to the Labor Department's approval of the program, and thereby, as a scheduled injury claimant, receive benefits never before available, and as a loss of earning capacity claimant increase his rate to the maximum, is a scenario waiting to be exploited.

The scenario is available to foreign workers employed under DBA contracts as they are entitled to the same benefits as American workers. While the Labor Department does not provide vocational retraining overseas, if these workers presented themselves for retraining and *Castro* benefit entitlement in the U.S., they would not be

denied temporary total benefits for the duration of their participation in the program.

SUMMARY OF ARGUMENT

Despite its protestations to the contrary, the Ninth Circuit in *Castro* created a new "disability" classification thereby establishing compensation benefits entitlement to claimants whose status never before provided such entitlement. For the first time, an LHWCA claimant was awarded temporary total disability benefits for the period of his involvement in a U.S. Department of Labor approved vocational retraining program despite the fact that his injury was one of a permanent partial disability, schedulable under the LHWCA, and he possessed a wage earning capacity after reaching maximum medical improvement. This determination rejects the express statutory scheme established by the LHWCA to provide compensation in accord with economic loss, either by assessing a loss of wage earning capacity or a defined schedule. With self-proving analysis the Ninth Circuit redefined "disability" to include the incapacity to earn wages because of participation in a vocational retraining program. In this course it rejected this Court's directives in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980) ("PEPCO").

The LHWCA, by its statutory terms and conceptual underpinnings, defines disability so as to prevent a classification of temporary total disability solely as a consequence of a claimant's participation in a vocational program. The *Castro* decision creates such a classification without benefit of statutory support and without benefit of

any legislative history expressing a Congressional intent to create such a classification. Rather, the opposite is true. The plain and unambiguous statutory text of 33 U.S.C. § 908, the only provision of the LHWCA which addresses the four classifications of disability, rejects the concept that a claimant can be temporarily totally disabled while he has an earning capacity. Further, the extensive legislative history of the 1984 amendments to the LHWCA makes clear that Congress specifically addressed the issue of providing compensation benefits to claimants while undergoing vocational rehabilitation and affirmatively rejected the creation of such an entitlement.

ARGUMENT

The LHWCA and, accordingly, the DBA, provide compensation benefits only in circumstances in which an injury has resulted in economic loss to the claimant. By its clear terms the statute defines the triggering event of entitlement to benefits, i.e., disability, as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). The "incapacity" to earn must be because of the "injury." Disability under the LHWCA is an economic concept of wage loss caused by the medical consequences to the claimant of the injury.

The four classifications of disabled status wholly reflect this conceptual foundation. Permanent disability status, be it total or partial, is attained when the claimant reaches, to the extent possible, full medical recovery from the injury yet continues to suffer economic loss with either no earning capacity or a reduced one. Temporary disability